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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DON COATS,

Plaintiff and Respondent, **A122625**

v. **(San Mateo County Super. Ct. No. CIV472798)**

SAN MATEO COUNTY HARBOR DISTRICT et al.,

Defendants and Appellants.

_____/

Respondent Don Coats filed a civil complaint against the San Mateo County Harbor District (District) and three of its employees alleging he had been subjected to disability discrimination. The District and its employees filed a motion to strike under the SLAPP statute, (Code Civ. Proc., § 425.16)[1] arguing they were entitled to prevail as a matter of law because Coats could not establish a prima facie case. The trial court conducted a hearing on the motion and denied it, ruling the SLAPP statute did not apply. The District and its employees now appeal arguing the SLAPP statute did apply and that Coats cannot establish a prima facie case. We agree and will reverse the order denying the motion to strike.

[1] Unless otherwise indicated, all further section references will be to the Code of Civil Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

The District is a public entity that operates Pillar Point Harbor on the San Mateo Coast and Oyster Point Marina on the San Francisco Bay. The District is governed by a five-member elected board (Board). At the time of the events that are at issue in this case, the District's management staff included appellants Peter Grenell, the general manager; Dan Temko, the harbormaster, and Eileen Wilkerson, the human resources manager.

Respondent Don Coats has worked for the District for nearly 20 years. By 2007, he held the position of lead maintenance specialist.

In early 2007, Temko noticed problems with Coats's performance. Coats began discussing his marital problems with others at work, used abusive language, and drove erratically while on District property. Temko recommended that Coats be placed on administrative leave and be sent for an examination to determine if he was fit for duty.

Coats was examined by Dr. Mark Perl, a psychiatrist, who found that he was not fit for duty because he presented a risk of harm to himself and others. The District placed Coats on paid administrative leave until May 25, 2007.

Coats disagreed with Dr. Perl's conclusion. He asked for a second opinion. Dr. Perl examined Coats again several weeks later and determined he was then fit for duty. Human Resources Manager Wilkerson notified Coats that he could return to work.

Coats returned to work on May 25, 2007. He met with Grenell and Temko who told him he should not discuss his personal problems with others at work.

About a week later, Coats was talking at work with Temko and a subordinate when he began to describe a sexual experience that he had with an internet partner. Coats used hand gestures to mimic the sexual conduct that had occurred. Later, the subordinate complained to Temko that Coats's comments had been inappropriate.

The next day, another incident occurred. Coats arrived late to work explaining that he had been up late the night before drinking in a bar. Coats said he had "chased some skirt" but that he had not been able to "get laid." Two of Coats's coworkers believed the comments were offensive and they complained to Temko. The coworkers,

however, would not put their complaints in writing because Coats owned firearms and liked to kill things and they were afraid he might retaliate.

Temko and Wilkerson undertook an investigation to determine if remedial and/or disciplinary action was warranted. Pursuant to District policy, Temko told Coats not to discuss the investigation with his coworkers.

Coats ignored Temko's request. He immediately complained to coworkers that he was being investigated for talking about "not getting any pussy." Coats also told coworkers the names of the two coworkers who he believed had complained.

After Temko completed his investigation, General Manager Grenell decided to terminate Coats for violating the District's anti-harassment policy and for insubordination. Grenell terminated Coats effective July 10, 2007.

Coats appealed his termination to the Board. The Board conducted a public appeal hearing that lasted two days. The local press attended the second day of the proceedings. Coats was represented by counsel who conceded Coats deserved discipline, but argued a lesser level was appropriate because Coats had a disability. Coats presented a letter from a psychiatrist, Dr. David Silverman, who stated Coats was experiencing "major depression." The Board continued the hearing so Dr. Silverman could testify.

Dr. Silverman did not in fact testify at the continued hearing, and the District rebutted Dr. Silverman's position with testimony from Dr. Perl. He stated that neither Coats's depression, nor any of his medications would cause Coats to talk to others about sex at work, or cause him to be insubordinate. Dr. Perl concluded Coats was fully able to control his behavior.

Coats also testified at the hearing and he admitted he had used sexually explicit language at work. Coats also admitted he understood that discussing sex at work could create a hostile work environment; however, he said he did not understand why comments about "getting laid" would be construed as sexual.

After considering this evidence, the Board found cause to discipline Coats, but that termination not required. The Board suspended Coats for six months and demoted him to a nonsupervisory position. Importantly for purposes of the present appeal, the Board

found that none of the District's managerial employees took any adverse action against Coats based on any actual or perceived disability. The Board also found that prior to the appeal hearing, Coats never alleged that he had a disability and that he had never asked for any accommodation or the interactive process.

Coats *did not* challenge the Board's decision by filing a petition for writ of mandate. Instead, in May 2008 he filed the complaint that is at issue in the current appeal. Naming the District, Grenell, Temko, and Wilkerson as defendants, Coats alleged five causes of action. The first four were based on the Fair Employment and Housing Act. (Gov. Code, § 12940.) Coats alleged disability discrimination, retaliation failure to accommodate, and disability harassment. In his fifth cause of action, Coats alleged that by discriminating against him based on his disability in violation of FEHA, the defendants violated Business and Professions Code 17200. The factual allegations of the complaint focused on the "sham" investigation and "trumped up" disciplinary charges that were the subject of the disciplinary appeal.

The District and the other defendants answered the complaint and then filed a motion to strike under the SLAPP statute. They argued they were entitled to prevail, as a matter of law, because complaint came within the scope of the statute and Coats could not establish a prima facie case. The trial court conducted a hearing on the motion and denied it ruling the SLAPP statute did not apply. Having reached that conclusion, the court did not attempt to determine whether Coats had presented sufficient evidence to make out a prima facie case.

II. DISCUSSION

The District and its employees[2] contend the trial court erred when it denied its motion to strike under the SLAPP statute.

Section 425.16, the SLAPP statute, provides a mechanism under which certain unmeritorious claims may be dismissed by means of a special motion to strike. (*Mann v.*

[2] Unless more specificity is needed, we will refer to the District and its employees collectively as the District.

Quality Old Time Service, Inc. (2004) 120 Cal.App.4th 90, 102.) As is relevant here, section 425.16, subdivision (b)(1) states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

A court ruling on a motion under the SLAPP statute must go through a two-step process. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) First, the court must determine whether the moving defendant has made a threshold showing that the challenged causes of action arise from protected activity, that is, activity by defendants in furtherance of their constitutional right of petition or free speech. (*Ibid.*) The protected acts include: (1) written or oral statements made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) written or oral statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other proceeding authorized by law; (3) written or oral statements made in a place open to the public or in a public forum in connection with an issue of public interest; or (4) any other conduct in furtherance of the exercise of the constitutional rights of petition or free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e).)

Second, if the court finds that the defendant has met its initial burden, it then determines whether the plaintiff has demonstrated a probability of prevailing on its claim. (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67.) To satisfy this prong, "the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should

grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.)

On appeal, we review the SLAPP motion de novo to determine whether the parties have met their respective burdens. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 79.)

With this background, we turn to the first step of the SLAPP analysis: whether the District made a showing that the causes of action alleged arose from protected activity. To answer this question we look first to the complaint. It contains five causes of action all of which are based on the same factual allegations. Coats alleged that he was subjected to discrimination and harassment by being the object of an "internal investigation" based on "'trumped up' charges" that he harassed others. The "trumped up charges" were that he "allegedly mention[ed]" to two coworkers that he "had not gotten laid after drinking at a bar," that he had discussed his "personal and emotional problems" at work, and that he told others that he was being investigated. The complaint alleges the defendants "admitted" the investigation "was not legitimate[.]" It also alleges Coats was "suspended and demoted" based on the "sham investigation" of the "petty and trumped up charges of alleged harassment[.]"

The question before us is whether causes of action that are founded on these allegations come within the scope of the SLAPP statute. We conclude the answer is yes.

The SLAPP statute protects against causes of action that "aris[e] from protected activity" (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67), and under section 425.16, subdivision (e)(2) protected activity is defined to include written or oral statements that are made in connection with an issue that is under consideration or review at a proceeding authorized by law. The causes of action set forth in Coats's complaint plainly arose from, and were based on the District's attempt to investigate and discipline him because of his inappropriate and subordinate conduct—all of which was an

issue that was "under consideration or review" at the appeal hearing and a "proceeding authorized by law[.]" (§ 425.16, subd. (e)(2).) We conclude the SLAPP statute applied.

The conclusion we reach on this point is well supported by authority. Many cases have held that a public employer's investigative and disciplinary procedures are an "official proceeding authorized by law" within the meaning of the SLAPP statute. For example in *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373 (*Miller*), the city investigated Miller and terminated him for misconduct. (*Id.* at p. 1376.) Miller then filed a complaint against the city alleging various causes of action including discrimination under FEHA, defamation, and intentional infliction of emotional distress. (*Id.* at p. 1378.) The city demurred and filed a motion to strike under the SLAPP statute. The trial court granted the motion to strike and the *Miller* court affirmed because the "thrust" of Miller's claims was "the City's investigation into Miller's conduct in connection with his public employment and its determination and report that he had engaged in misconduct on the job . . . . On this record, the first prong of section 425.16 is satisfied." (*Id.* at p. 1383.)

Similarly, in *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, the plaintiff alleged the department's employees defamed him by concocting a "'web of lies'" that resulted in an internal investigation. (*Id.* at pp. 1541, 1544.) The trial court granted the defendant's motion to strike and the *Hansen* court affirmed ruling that the complaint came within the scope of the SLAPP statute because it was based in part on "statements and writings CDCR personnel made during the internal investigation . . . ." (*Id.* at p. 1544; see also *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 610; *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1061.)

Here, as in *Miller* and *Hansen,* the SLAPP statute applied because the causes of action Coats alleged plainly arose from and were based on the District's investigation into his inappropriate conduct and the District's decision to impose discipline against him as a result of that misconduct.

Coats argues the SLAPP statute does not apply because the District's investigation into his misconduct was "irrelevant" to the causes of action he alleged. He argues the true basis for his complaint was not the District's investigation and the discipline that followed, but underlying discriminatory acts of the District and its employees; most of which were not set forth in his complaint. For example, Coats argues he was subjected to discrimination when the District refused to accommodate his request that he not be required to work on Saturdays, when Harbormaster Temko forced him to remove certain personal items from his office at work, and by the fact that Temko became angry when Coats tried to talk to him about accommodation. Coats argues it is "this conduct of harassment related to his disability that is the basis of [his] claims, not any purported written or oral statement that may have been made . . . during an administrative proceeding."

The mere fact that an action was filed after protected activity took place does not mean that the action arose from that activity for purposes of the SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Rather, the critical inquiry is whether the complaint was "*based on*" the defendant's protected activity. (*Ibid.*, original italics.) Here, the allegations set forth in the complaint and the evidence that was submitted convince us that protected activity was the "'the gravamen or principal thrust'" of the action. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477, quoting *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) Furthermore, to the extent Coats relies on allegations that were not set forth in the complaint and that arguably might be outside the scope of the SLAPP statute, he still cannot prevail. A plaintiff cannot frustrate the proposes of the SLAPP statute simply by combining protected and nonprotected activity in one cause of action. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308.) A "mixed cause of action" is subject to the SLAPP statute so long as at least one of the underlying acts is protected and is not merely incidental to the unprotected activity. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287.) Here, despite Coat's protestations to the contrary, the complaint demonstrates that

protected activity is the primary focus of his complaint. The SLAPP statute applied under these circumstances.[3]

We next turn to the second step SLAPP analysis: whether Coats demonstrated a probability of prevailing on his claim. (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67.) To satisfy this prong, Coats had the obligation to demonstrate that his complaint was both legally sufficient and supported by a prima facie showing of facts that is sufficient to sustain a favorable judgment. (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 821.) In deciding this question of potential merit, we must consider the pleadings and evidentiary submissions of both the parties and determine if, as a matter of law, the District's evidence supporting the motion defeats Coats's attempt to establish evidentiary support for the claim. (*Ibid.*)

Here, the primary evidence Coats submitted in opposition to the SLAPP motion was a declaration that he prepared. Coats described various incidents, (many of which were not set forth in his complaint) that he alleged showed the District and its employees discriminated against and harassed him because of his disability.

In an effort to defeat that showing, the District relied on the fact that Coats had already litigated his discrimination and harassment claims at the appeal hearing before the Board, and had *lost.* Noting that Coats had never challenged that finding by filing a petition for writ of mandate, the District argued the Board's administrative decision was binding under principles of collateral estoppel. We agree with the District on this point.

Our Supreme Court has made clear that a ruling issued by a quasi-judicial administrative agency that is not challenged appropriately is entitled to collateral estoppel effect. For example, in *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 (*Johnson*), the plaintiff was a city employee who was notified he was being laid off. He filed a grievance with the city's personnel board that was rejected. The plaintiff appealed the rejection to the local city council who also rejected it. (*Id.* at p. 66.) After receiving a

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[3] Having reached this conclusion, we need not address the other arguments the parties make on the first prong of the SLAPP analysis.

right to sue letter from the Department of Fair Employment and Housing, the plaintiff filed a complaint alleging, inter alia, discrimination under FEHA. (*Id.* at pp. 66-67.) The trial court granted the city's motion for summary judgment ruling the plaintiff's failure to challenge the administrative findings against him, meant the plaintiff was bound by those findings. (*Id.* at p. 67.) Our Supreme Court affirmed that ruling explaining its decision as follows: "Plaintiff exhausted his administrative remedies: He appealed to the city council the personnel board's finding that his termination was based on economic, not discriminatory, reasons. The council upheld the board's decision. But plaintiff failed to seek timely judicial relief from the City's administrative determination. Therefore, the City's decision 'has achieved finality' [citation], and 'has the effect of establishing the propriety' of the City's decision. [Citation.] [¶] Plaintiff's FEHA claim that his discharge was for discriminatory reasons is at odds with the preceding determination by the City that the termination was for economic reasons, a finding that . . . is now binding." (*Johnson, supra,* 24 Cal.4th at p. 71.)

Our Supreme Court addressed the same point in *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074 (*Schifando*), where the issue was whether a city employee was *required* to exhaust internal administrative remedies before filing suit. The court ruled there was no such requirement, (*id.* at p. 1080) but it cautioned that an employee who pursues internal administrative remedies *and* files a claim with the Department of Fair Employment and Housing would be entering into a "'procedural minefield.'" (*Id.* at p. 1088.) As the court explained, "We serve judicial economy by giving collateral estoppel effect to appropriate administrative findings. *Johnson's* requirement that employees exhaust *judicial* remedies ensures proper respect for administrative proceedings. It requires employees challenging administrative findings to do so in the appropriate forum, by filing a writ of administrative mandamus petition in superior court. *Johnson* also ensures that employees who choose to utilize internal procedures are not given a second 'bite of the procedural apple.'" (*Schifando, supra,* 31 Cal.4th at pp. 1090-1091.)

The court in *Miller, supra,* 169 Cal.App.4th 1373 applied the principles set forth in *Johnson* and *Schifando* when faced with facts that are virtually identical to those

presented here. There, the city investigated Miller and terminated him for misconduct. Miller appealed his decision to a reviewing board. The board conducted a hearing and upheld the termination. (*Miller*, *supra*, 169 Cal.App.4th at pp. 1376-1377.) Miller did not challenge the board's decision by filing a petition for writ of mandate. Instead, he filed a civil complaint against the city alleging various causes of action. (*Id.* at p. 1378.) The city demurred and filed a motion to strike under the SLAPP statute. The trial court granted the SLAPP motion and Miller appealed. (*Id.* at p. 1379.) The *Miller* court affirmed the trial court's SLAPP ruling holding that Miller could not make out a prima facie case: "As for the second prong [of the SLAPP statute], because Miller is collaterally estopped from arguing that his termination was wrongful in light of the finality of the administrative proceedings concluding he was properly terminated . . . Miller cannot meet his burden of establishing a probability of prevailing on the merits of these two claims." (*Id.* at p. 1383.)

We reach the same conclusion here. Coats appealed the District's initial decision to terminate him to the Board. At that appeal hearing, Coats argued that he been subjected to discrimination and harassment based on his disability. The Board rejected Coats's argument explaining as follows: "The Board has considered the evidence presented regarding Coats' mental status during the time he was off work from April 20, 2007 to May 25, 2007, and after he returned to work on that latter date. . . . At no time . . . did Coats allege that he had an actual or perceived disability, nor did he request any accommodation or interactive process following his return to work. At Coats' *Skelly* conference, on July 2, and later at the hearing in open session, he did not claim that he was discriminated against, harassed, or retaliated against because of an actual or perceived disability; he did not claim that he was denied an accommodation or interactive process. The Board finds that none of the District's managerial personnel (Peter Grenell, Eileen Wilkerson, Dan Temko) took any adverse action against Coats on the basis of any perceived or actual disability or medical condition."

Here, as in *Miller*, the Board's finding of no disability discrimination or harassment is entitled to collateral estoppel effect. As a matter of law, Coats cannot carry his burden of showing it is likely he would prevail the causes of action he alleged.

In his briefing to us, Coats has *not* attempted to argue that the evidence he presented in opposition to the SLAPP motion was sufficient to make out a prima facie case if the principles of collateral estoppel apply. Rather, he argues that because he was not *required* to exhaust his administrative remedies before filing suit, the Board's decision on the appeal is not relevant. This is simply incorrect. It is true that under *Schifando, supra,* 31 Cal.4th at page 1080, Coats was not obligated to pursue his administrative remedies before filing suit. However, that does not mean that once Coats chose to pursue his administrative remedies, he could then ignore the results. As another court stated when addressing this same argument, "Public employees have the benefit of the civil service commission process to redress discrimination, which is less costly and protracted than litigation. Though a public employee may choose to bypass the administrative process, if [he] pursues it through evidentiary hearings to a proposed decision, then [he] has the burden to exhaust administrative and judicial remedies notwithstanding the risk that a FEHA claim may no longer be viable." (*Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135, 1143-1144.) "[I]f a public employee has requested a non-FEHA administrative remedy such as a civil service commission hearing and obtained an adverse decision, the employee must exhaust judicial remedies by filing a petition for writ of mandate in the trial court, or else the administrative decision will be binding on subsequent FEHA claims." (*Id.* at p. 1142.)

Here, because Coats failed to challenge the Board's administrative decision that he was not subjected to disability discrimination, that decision is now final and it has collateral estoppel effect.[4] As a matter of law, Coats had not demonstrated that he can

[4] At oral argument, both parties tried to present a new issue; each offered extensive argument, including citation to new authorities, on whether the record was sufficient to support the elements of collateral estoppel. Neither party raised this argument in their briefs. We decline to address an argument that was made for the first time at oral

make out a prima facie case.[5]

III. DISPOSITION

The order denying the SLAPP motion is reversed. The trial court is ordered to prepare a new order granting the motion. Having prevailed on the motion to strike, the District and its employees are entitled to recover the attorney fees they incurred both in the trial court and on appeal. (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1038.) The trial court must determine the appropriate amount.

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JONES, P.J.

We concur:

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SIMONS, J.

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BRUINIERS, J.

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argument, and do not rely on authorities not cited in the briefs. (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356-357, fn. 6; *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1408.)

[5] Having reached this conclusion, we need not reach the other arguments the parties make on the second prong of the SLAPP analysis.